United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1807

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

NO. 74-1807

INSURANCE COMPANY OF NORTH AMERICA,
Plaintiff-Appellee,

v.

GELB BROS. & ZUCKERMAN, INC.,
JAMES J. JOWDY, JACQUELINE JOWDY,
EDWARD J. JOWDY, AND JOAN JOWDY,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT AND PLAINTIFF-APPELLEE'S MOTIONS FOR SUMMARY AFFIRMANCE OF JUDGMENT OR FOR ORDER DISMISSING APPEAL.

BRIEF FOR PLAINTIFF-APPELLEE

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STATEMENT OF ISSUES PRESENTED FOR REVIEW.

1. Where appellants have intentionally and willfully ignored the mandatory requirement of F.R.A.P. Rule 30 (a) that the "appellant shall prepare and file an appendix to the briefs," by filing no appendix at all, should this Court grant a summary affirmance of the judgment from which the appeal is taken?

2. Where appellants have prepared and filed no appendix of any kind with their brief in flagrant violation of the mandatory requirement of F.R.A.P. Rule 30 (a) that the appellant shall serve and file the appendix with his brief, should the appeal be dismissed?

3. Where the District Court made detailed findings of fact and conclusions of law based upon a consideration of the complaint, the supporting affidavits, and the documentary exhibits on file, may those findings of fact and conclusions of law be set aside as clearly erroneous under Fed. Rules Civ. Proc. rule 52 (a)?

4. When defendants filed no answer, or other pleading to the complaint, and no affidavits opposing plaintiff's motion for summary judgment, and when the complaint, the supporting affidavits, and the documentary exhibits on file show that there is no issue of fact, and that plaintiff is entitled to judgment as a matter of law, was the District Court correct in entering a summary judgment for plaintiff?

STATEMENT OF THE CASE

Nature of the Case

Plaintiff-appellee, Insurance Company of North America, INA, brought this action against defendants-appellants, Gelb Bros. & Zuckerman, Inc., Gelb, James J. Jowdy, Jacqueline Jowdy, Edward J. Jowdy, and Joan Jowdy, hereinafter referred to collectively as the Jowdys, to recover losses and expenses it incurred and sustained by reason of having become surety on two separate tax payment bonds for Gelb, a corporation wholly owned, controlled, and operated by the Jowdys, who, in addition to Gelb, executed and delivered to INA their indemnity agreements to induce it to become surety on Gelb's bonds.

Course of Proceedings.

On July 27, 1973, INA filed its complaint (R. Doc. No. 1) in four counts. Counts I and II are against Gelb, as principal in the bonds, and as indemnitor in two of the indemnity agreements, which are attached to the complaint, as Exhibits A and B

(Count I, pars. 1-9, pp. 1-4; Count II, pars. 1-10, pp. 4, 5).

Count III is against James and Jacqueline Jowdy on their indemnity agreement which is attached to the complaint, as Exhibit C (R. Doc. No. 1, Count III, pars. 1-6, pp. 6, 7). Count IV is against Edward and Joan Jowdy on their indemnity agreement which is attached to the complaint as Exhibit D (R. Doc. No. 1, pars. 1-6, pp. 7, 8).

On September 18, 1973, the marshal filed his return of service (R. Doc. No. 2), showing service on the Jowdys on August 1, 1973, by leaving the summonses and copies of the complaint at their residences, and service on Gelb on September 18, 1973, by serving Edward J. Jowdy, an officer, in person.

On October 15, 1973, Mark A. Asmar, Louis F. Green, and Arthur N. Greenblatt filed an appearance for all defendants (R. Doc. No. 3).

Gelb and the Jowdys filed no answer, or other pleading, to the complaint, as required by Fed. Rules

Civ. Proc. rules 8 (b), (c), and 12 (b), and (h), 28 U.S.C.A.

On November 13, 1973, INA served and filed its notice of motion for summary judgment (R. Doc. No. 4), pursuant to Fed. Rules Civ. Proc. rule 56, 28 U.S.C.A., and Local Rule 10 (a) (3), on the ground that the complaint on file (R. Doc. No. 1), the documentary exhibits annexed thereto, the supporting affidavits, and documentary exhibits annexed thereto, show that there is no genuine issue as to a material fact, and that INA is entitled to judgment as a matter of law.

INA filed with its notice of motion the supporting affidavit of Ronald W. Stewart (R. Doc. No. 5), to which were attached documentary Exhibits A-F; copies of which were duly served on the attorney for Gelb and the Jowdys.

Gelb and the Jowdys filed no affidavit in opposition to INA's motion for summary judgment; but, on November 29, 1973, their attorney filed a four-page brief in opposition to the motion, in which he argued that the indemnity agreements signed by the Jowdys, and dated July 1, 1970, did not cover the loss sustained by INA

on the tax payment bond which was dated June 26, 1970, but which showed on its face that it did not become effective until July 1, 1970 (Doc. Entry on Nov. 29, 1973).

On December 3, 1973, INA's motion for summary judgment came on for hearing and, by agreement of the attorneys for all parties, the motion was presented to the Court on the papers (R. Doc. Entry Dec. 3, 1973).

On December 4, 1973, the Court granted INA's motion for summary judgment, and directed that INA file proposed findings of fact and conclusions of law, together with form of judgment within ten days (R. Doc. Entry, Dec. 4, 1973).

On December 10, 1973, the Court extended the time for filing proposed findings of fact and conclusions of law to January 14, 1974, due to illness of INA's counsel (R. Doc. Entry Dec. 10, 1973).

On January 30, 1974, the attorney for Gelb and the Jowdys filed proposed findings of fact and conclusions of law in which he eliminated a recovery against the

Jowdys for the loss under the bond, dated June 26, 1970, but which became effective July 1, 1970 (R. Doc. Entry Jan. 30, 1974).

On February 4, 1974, the Court held a hearing on the proposed findings of fact and conclusions of law filed by INA and by the attorney for Gelb and the Jowdys, at which time INA filed a supplemental affidavit of Joseph A. Newcomb (R. Doc. No. 6), in support of its motion for summary judgment and its proposed findings of fact and conclusions of law, to which were annexed the indemnity agreements of the Jowdys, dated July 1, 1969, covering a similar bond for the period, July 1, 1969 to June 30, 1970, as Exhibits A and B, the financial statements of the Jowdys, as of March 31, 1970, as Exhibits C and D, and the bond dated June 26, 1970, which showed on its face that it became effective July 1, 1970, as Exhibit E; which supporting affidavit and exhibits were accepted by the Court (Doc. Entry Feb. 4, 1974).

Disposition of the Case in the Court Below.

On February 19, 1974, the Court filed detailed findings of fact and conclusions of law (R. Doc. No. 7), in which it found that there was no issue of fact in the case, and that INA was entitled to judgment as a matter of law, and it directed that judgment enter in favor of INA, and against Gelb and the Jowdys, for $112,856.90 (R. Doc. No. 7, pp. 1-21).

On March 4, 1974, judgment was entered in favor of INA, and against Gelb and the Jowdys, for $112,856.90 (R. Doc. No. 8).

On March 15, 1974, a bill of costs was taxed in favor of INA, and against Gelb and the Jowdys, for $104.00 (R. Doc. No. 9, pp. 1, 2).

STATEMENT OF FACTS.

Background

In order to see this case in its proper perspective, it is necessary to go back to April, 1969, when James and Edward Jowdy formed an equal partnership, and purchased the stock, fixtures, trade name, and good will of Irving Fisher, a licensed wholesale cigarette distributor, who conducted business at 14 Beckley Avenue, in Stamford, Connecticut, under the trade name of Gelb Bros. & Zuckerman.

Connecticut General Statutes, § 12-286, requires each cigarette distributor to secure a license from the tax commissioner before engaging in business, and under § 12-288, the license is valid from the date issued to the following September 30.

Pursuant to C. G. S. A., §§ 12-286 and 12-288, James and Edward Jowdy, co-partners, doing business as Gelb Bros. & Zuckerman, applied to, and obtained from the tax commissioner, a license to engage in business as a cigarette distributor at 14 Beckley Avenue,

Stamford, Connecticut, which license expired September 30, 1969, and they obtained a new license for the period from October 1, 1969, to September 30, 1970 (Supp. Affidavit, Doc. 6, par. 6, pp. 2, 3; Find., Doc. 7, par. 3, p. 3).

Under C.G.S.A., § 12-298, the tax commissioner may permit a licensed cigarette distributor to purchase cigarette stamps on credit, upon filing a tax credit bond satisfactory to the tax commissioner; and the tax commissioner requires the tax credit bond to run for a one year period, from July 1, to the following June 30, to coincide with the State's fiscal year (Supp. Affidavit, Doc. 6, pars. 7, 8, p. 3; Find., Doc. 7, par. 4, p. 3).

Pursuant to C.G.S.A., § 12-298, James and Edward Jowdy, co-partners, doing business as Gelb Bros. & Zuckerman, applied to the tax commissioner for a permit to purchase cigarette stamps on credit for the one year period, commencing July 1, 1969, and ending June 30, 1970 (Find., Doc. 7, par. 5, p. 4).

INA Writes Jowdys' 1969 Tax Credit Bond On Their Indemnity.

James and Edward Jowdy, co-partners, doing business as Gelb Bros. & Zuckerman, applied to INA for the tax credit bond which they were required to file with the tax commissioner, in the penal sum of $100,000, for the period commencing July 1, 1969, and ending June 30, 1970 (Supp. Affidavit, Doc. 6, par. 9, p. 4; Find., Doc. 7, par. 6, p. 4).

In consideration of INA agreeing to become surety on their tax credit bond, James and Edward Jowdy, with their respective wives, orally promised and agreed to execute and deliver to INA written indemnity agreements, wherein they would agree to indemnify INA against all loss, cost, and expense it might sustain or incur by reason of becoming surety on their tax credit bond (Supp. Affidavit, Doc. 6, par. 9, p. 4; Find., Doc. 7, par. 7, p. 4).

In keeping with their oral promises, the Jowdys did execute and deliver to INA their joint and several indemnity agreements, under seal, dated July 1, 1969, duplicated copies of which are annexed to the supple-

mental supporting affidavit, as Exhibits A and B, respectively (Supp. Affidavit, Doc. 6, pars. 10, 11, p. 4; Find., Doc. 7, pars, 8, 9, p. 4).

In reliance upon their oral promises, followed by the two written indemnity agreements executed by the Jowdys, INA became surety on their tax credit bond, which named James and Edward Jowdy, co-partners, doing business as Gelb Bros. & Zuckerman, as principal, and which was filed with the tax commissioner to cover the period from July 1, 1969 to June 30, 1970 (Supp. Affidavit, Doc. 6, par. 12, p. 5).

No claim was made by the tax commissioner on the 1969 tax credit bond given by the Jowdys, doing business as Gelb Bros. & Zuckerman (Supp. Affidavit, Doc. 6, par. 13, p. 5; Find., Doc. 7, par. 10, p. 5).

Jowdys Apply To INA For Their 1970 Tax Credit Bond.

Along about May 1, 1970, the Jowdys commenced negotiations with INA to become surety on their 1970 tax credit bond. As an inducement to INA to become surety on their tax credit bond covering them as partners

for the period commencing July 1, 1970, and ending June 30, 1971, the Jowdys submitted to INA statements of their financial condition, as of March 31, 1970, prepared by O'Byrne, Aldrich & Hubb, certified public accountants of Danbury, Connecticut; duplicated copies of which are annexed to the supplemental affidavit, as Exhibits C and D (Supp. Affidavit, Doc. 6, par. 14, p. 5; Find. Doc. 7, par. 11, p. 5).

During the negotiations for their 1970 tax credit bond, which continued through May and June, 1970, the Jowdys orally promised and agreed to indemnify INA under written indemnity agreements, the same as they had done in the case of the 1969 tax credit bond, if INA would become surety on their new tax credit bond (Supp. Affidavit, Doc. 6, par. 15, p. 6; Find., Doc. 7, par. 12, p. 5).

The Jowdys Incorporate
Gelb Bros. & Zuckerman, Inc.

On June 22, 1970, or eight days before the new 1970 tax credit bond was to be filed, James and Edward Jowdy incorporated Gelb Bros. & Zuckerman, Inc.

under the laws of the State of Connecticut, to engage in the business of a wholesale cigarette distributor, with an authorized capital of $150,000, consisting of 150 shares of $1,000 par value stock, and a paid in capital of $1,000; James J. Jowdy was president, Taffy Jowdy, another brother, was vice president, and Edward J. Jowdy was secretary and treasurer; and the board of directors consisted of the three officers (Supp. Affidavit, Doc. 6, par. 16, p. 6; Find., Doc. 7, par. 13, p. 5).

James and Edward Jowdy, co-partners, doing business as Gelb Bros. & Zuckerman, continued the business as a partnership until June 30, 1970, and, as required by C.G.S.A., § 12-288, they returned the license issued to them on October 1, 1969, and their corporation assumed the business of the partnership as of July 1, 1970 (Supp. Affidavit, Doc. 6, par. 17, pp. 6, 7; Find., Doc. 7, par. 14, p. 6).

Gelb, acting through James and Edward Jowdy, applied to the tax commissioner for a license to engage in the business of a cigarette distributor, pursuant to

the requirements of C. G. S. A., §§ 12-286 and 12-288 for the period from July 1, 1970, to September 30, 1970, and for a permit to purchase cigarette stamps on credit for a period of one year, commencing July 1, 1970, and ending June 30, 1971, pursuant to C. G. S. A., § 12-298 (Find., Doc. 7, par. 15, p. 6).

The Jowdys Request INA To Execute Gelb's 1970 Connecticut Tax Credit Bond On Their Personal Indemnity.

The Jowdys requested INA to become surety on Gelb's 1970 Connecticut tax credit bond, in the penal sum of $100,000, for the period commencing July 1, 1970, and ending June 30, 1971 (Supp. Affidavit, Doc. 6, par. 18, p. 7; Find., Doc. 7, par. 16, p. 6).

In consideration of INA agreeing to become surety on Gelb's 1970 Connecticut tax credit bond, and as a condition precedent to INA agreeing to become surety on that bond, the Jowdys orally promised and agreed to execute and deliver to INA their written indemnity agreements, wherein they would agree to indemnify INA against all loss, cost, and expense it should sustain or incur by reason of becoming surety

on Gelb's tax credit bond, the same as they had done in the case of the 1969 tax credit bond which INA had executed for their partnership (Supp. Affidavit, Doc. 6, par. 18, p. 7; Find., Doc. 7, par. 22, p. 8).

In reliance upon the Jowdys' oral promises and agreements to execute and deliver to INA written indemnity agreements, naming Gelb, their corporation, as Principal, the tax credit bond, naming Gelb, as Principal, and INA, as Surety, in the penal sum of $100,000, dated June 26, 1970, was signed and sealed by the Principal and the Surety in INA's Hartford Service Office on June 26, 1970, to cover the period commencing July 1, 1970, and ending June 30, 1971; and it was conditioned that Gelb should pay all taxes, interest, and penalties in accordance with the provisions of the statute (Supp. Affidavit, Doc. 6, par. 19, pp. 7, 8; Find., Doc. 7, par. 23, p. 8).

The 1970 Connecticut tax credit bond (Exhibit E to supplemental affidavit, Doc. 6) recites on its face: "This bond is for a period commencing 1st day of July, 1970, and ending 30th day of June, 1971." Edward J.

Jowdy signed the bond for Gelb. The permit to purchase cigarette stamps on credit, which was secured by the bond, was issued on July 1, 1970 (Supp. Affidavit, Doc. 6, par. 23, p. 9).

As part of the consideration for INA to execute Gelb's 1970 tax credit bond, Gelb, through James J. Jowdy, executed and delivered to INA a written application and agreement of indemnity, dated July 1, 1970; a duplicated copy of which is annexed to the complaint (Doc. 1) as Exhibit A, and Count I of the complaint is based upon that indemnity agreement (Doc. 1, Count I, pars. 1-9).

In compliance with their oral promises and agreements, the Jowdys did execute and deliver to INA their joint and several indemnity agreements, under seal, which were dated July 1, 1970. Duplicated copies of those indemnity agreements are annexed to the complaint (R. Doc. 1), as Exhibits C and D, and to the supporting affidavit (R. Doc. 5), as Exhibits A and B. Counts III and IV of the complaint are based upon those indemnity agreements (Supp. Affidavit, Doc. 6, pars. 21, 22, pp. 8, 9; Find., Doc. 7, pars. 24, 25, pp. 8, 9;

Comp., Doc. 1, Count III, pars. 1-6, pp. 6, 7; Count IV, pars. 1-6, pp. 7, 8).

Except for the names of the indemnitors, the two indemnity agreements executed by the Jowdys, and dated July 1, 1970, contain identical language (Find., Doc. 7, par. 27, p. 9).

The first whereas clause refers to Gelb, the corporation, as Principal, and it recites that INA may from time to time "hereafter execute bonds" in behalf of the Principal (Exs. C, D to Comp., Doc. 1; Find., Doc. 7, par. 27, p. 9).

The second whereas clause recites that the "Indemnitor is financially *** interested in the affairs of the Principal and is, therefore, interested in enabling the Principal to procure the prompt and ready execution of such bonds" (Find. Doc. 7, par. 27, p. 9).

The third whereas clause recites that "to accomplish such purpose the Indemnitor is willing to execute this continuing agreement of indemnity." (Id).

In paragraph 1, the agreements recite that the terms, provisions, conditions and agreements contained

therein shall be binding upon the Indemnitor "with respect to any such bonds hereafter executed by the Company for the Principal" (Comp., Doc. 1, Exs. C, D; Find. Doc. 7, par. 27, p. 9).

By paragraph 3 of their indemnity agreements, the Jowdys agreed to perform the obligations of the bond, and to indemnify INA from and against every claim, demand, loss, liability, cost, charge, attorneys' fees, or expenses which INA might sustain or incur by reason of executing the bond (Comp., Doc. 1, Exs. C, D; Find., Doc. 7, par. 28, p. 9).

The Court specifically found that, "under the totality of the circumstances surrounding the execution of the Connecticut tax credit bond dated, signed, and sealed on June 26, 1970, at the plaintiff's Hartford Office, it was intended by all parties to become effective July 1, 1970. It was intended by the parties to be secured by the indemnity agreements signed on July 1, 1970, and constitutes one continuing contractual agreement. Otherwise, the indemnity agreements would have no meaning and constitute a vain

and purposeless act. This is further confirmed by the fact that the application (Ex. A to comp., Doc. 1, Count I) of the defendants for the bond issued June 26, 1970, was itself not signed until July 1, 1970" (Find. Doc. 7, par. 28 (a), p. 9a).

The Jowdys Request INA To Execute Gelb's New York Tax Credit Bond On Their Personal Indemnity.

Gelb, acting through James and Edward Jowdy, also applied to the New York State Tax Commission for a permit to purchase cigarette stamps on credit, and pay for them within 30 days after purchase, pursuant to Article 20 of the Tax Law (Comp., Doc., Count II, par. 2, p. 4; Find., Doc. 7, par. 17, p. 6).

At the special instance and request of the Jowdys, INA became surety on Gelb's cigarette credit bond required by the New York State Tax Commission, in the penal sum of $15,000; which was dated September 24, 1970, and was conditioned that Gelb should pay all sums due for cigarette stamps purchased by it, including penalties and interest, within 30 days after such purchase (Comp., Doc. 1, Count II, par. 3, p. 4;

Find., Doc. 7, par. 18, p. 7).

The Jowdys admit that the New York tax credit bond is covered by their indemnity agreements, dated July 1, 1970; but they have appealed from the entire judgment entered by the District Court, which strongly indicates that they are trying to avoid payment of any part of INA's loss and expenses.

INA Sustained Losses Under
Gelb's Tax Credit Bonds.

Between July 1, 1970, and June 30, 1971, Gelb purchased cigarette tax stamps from the tax commissioner of the State of Connecticut, and it breached the conditions of its bond, in that it failed to pay for such stamps as it was required to do by the statutes and the terms of its bond. INA was required to, and did on January 31, 1972, pay the tax commissioner of the State of Connecticut the sum of $82,803.02 in settlement of the claim on its bond, as evidenced by the official receipt of the tax commissioner attached to the supporting affidavit of Ronald W. Stewart, as Exhibit C (Doc. 5, Ex. C; Find., Doc. 7, par. 31, p. 10).

Gelb also breached the conditions of its New York tax credit bond, in that it purchased cigarette stamps on credit, and failed to pay for such stamps within 30 days after the purchase thereof, and INA was required to, and did on December 27, 1971, pay the New York State Tax Commission the sum of $8,987.60 in settlement of the claim on its bond, as evidenced by the official receipt of the New York State Tax Commission annexed to the supporting affidavit of Ronald W. Stewart (Doc. 5, Ex. D; Find., Doc. 7, par. 32, pp. 10, 11).

Incidentally, the Jowdys have never raised any question as to the losses paid by INA.

INA Incurred Attorney's Fees and Expenses.

INA has incurred, and obligated itself to pay, its attorney for services rendered in the investigation and settlement of the two claims made against it on its bonds, and in attempting to collect its losses and expenses from the Jowdys, without litigation, and in bringing this action against the Jowdys to enforce the provisions of their indemnity agreements, from October 20,

1971, to March 4, 1974, when the judgment was entered, in the sum of $9,000.

INA has also incurred miscellaneous out-of-pocket expenses during the same period in the amount of $36.48.

An itemized statement of INA's losses and expenses included in the judgment is set forth in the court's findings of fact (Find., Doc. 7, par. 37, p. 12).

The Jowdys have never questioned either the amounts or the propriety of the expenses.

By paragraph 4 of their indemnity agreements, the Jowdys agreed that their liability should extend to and include all costs, expenses, and attorneys' fees incurred or sustained by INA in making any investigation on account of the bonds, or in defending any action brought in connection therewith, or "in enforcing any of the agreements contained herein." (Find., Doc. 7, par. 29, p. 10).

The Jowdys have deliberately ignored the mandatory requirements of F.R.A.P. Rule 30 by failing to serve and file an appendix to the briefs. INA is

filing simultaneously with this brief a motion for summary affirmance of the judgment from which the appeal has been taken, or, in the alternative, for an order to dismiss the appeal.

This brief will serve as the appellee's brief and as the supporting brief for the motions.

ARGUMENT.

Point I.

Where appellants have intentionally and willfully ignored the mandatory requirements of F.R.A.P. Rule 30, that the "appellant shall prepare and file an appendix to the briefs," as the Jowdys have done in this case, fairness and justice to the Court and the appellee demand a summary disposition of the appeal by affirming the judgment from which the appeal is taken.

F.R.A.P. Rule 30 provides in pertinent part as follows:

> "(a) The appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court.

> "Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant shall serve and file the appendix with his brief. Ten copies of the appendix shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented, unless the court shall by rule or order direct the filing or service of a lesser number.
>
> "(b) The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, the appellant shall, not later than 10 days after the date on which the record is filed, serve on the appellee a designation of the parts of the record which he intends to include in the appendix and a statement of the issues which he intends to present for review. ***
>
> "(c) If the court shall so provide by rule for classes of cases or by order in specific cases, preparation of the appendix may be deferred until after the briefs have been filed, and the appendix may be filed 21 days after service of the brief of the appellee. ***".

This Court by its Rule, § 30, subdivision (1) has provided that a deferred appendix as provided in Rule 30 (c) may be filed in any case where the parties so stipulate or where, on application, a judge of this Court so directs.

The parties here have never stipulated that a deferred appendix may be filed, and the Jowdys have neither sought nor been granted permission to file a deferred appendix.

The record in this case is very short, and the Court would not have directed the filing of a deferred appendix if the Jowdys had applied for an order directing it.

The record in this case consists of the complaint and the four exhibits annexed thereto, the appearance of the attorneys for the Jowdys, the notice of motion for summary judgment, the two supporting affidavits with the exhibits attached thereto, the Court's findings of fact and conclusions of law, the judgment, and the taxation of costs. There is a 34-page transcript of the proceedings at the hearing on the proposed findings of fact and conclusions of law.

F.R.A.P. Rule 30 (a) mandates that the appendix shall contain all of the parts of the record enumerated above, except where the indemnity agreements of the Jowdys are annexed to the complaint as Exhibits C and D, and they are attached to the supporting affidavit of Ronald W. Stewart as Exhibits A and B. They would need to be included only once.

Rule 30 (b) provides that:

> "In the absence of an agreement, the appellant shall, not later than 10 days after the date on which the record is filed, serve on the appellee a designation of the parts of the record which he intends to include in the appendix and a statement of the issues which he intends to present for review" (emphasis supplied).

The Jowdys have never served on INA any designation of the parts of the record which they intended to include in the appendix. Neither did they serve on INA a statement of the issues they intended to present for review.

Thus, the Jowdys have intentionally and willfully ignored the mandatory requirements of F.R.A.P. Rule 30 from beginning to end. They have filed their brief, but they have failed to file an appendix of any kind. They are in flagrant violation of the appellate rules, without cause, and they should not be allowed to impose upon this Court the burden of searching the record to find a basis for reversal.

The Jowdys Having Deliberately Failed to File An Appendix in Flagrant Violation of Rule 30, The Judgment Appealed From Should Be Summarily Affirmed by This Court.

From the inception of this appeal, the Jowdys have given no evidence of a bona fide appeal, or that the appeal has any merit whatever.

For instance, they failed to pay the clerk of this Court the docket fee within the time required by F.R.A.P. Rule 12 (a), and as a result the clerk failed to enter the appeal upon the docket of this Court, and it failed to file the record on appeal. In order to get the appeal moving, INA followed the only remedy available to it, which was to file a motion to dismiss the appeal, pursuant to F.R.A.P., Rule 12 (c).

The Jowdys made no response to INA's motion to dismiss, even though they were notified by the clerk of their right to do so, and they were notified of the date of the hearing on the motion. Accordingly, this Court dismissed the appeal on June 25 by default.

Only after the appeal had been dismissed did the Jowdys pay the docket fee which accompanied their

motion to reinstate the appeal. No reasons were assigned for excusable neglect, but the appeal was reinstated by this Court on July 5, 1974, and the record on appeal was filed on that date.

Again, the clerk notified the attorney for the Jowdys of the requirements of an appendix and the other steps necessary to be taken following the filing of the record on appeal. Despite such notices by the clerk, the Jowdys did nothing about the preparation and filing of the appendix as required by Rule 30. There has not even been a token compliance with Rule 30.

In Gilroy v. Erie Lackawanna Railroad Co., 421 F. 2d 132 (2d Cir. 1970), this Court took a very dim view of the failure of appellants to comply with the appellate rules in order to permit an appeal to proceed at a normal pace.

Chief Judge Lumbard's language in the Gilroy case is clearly applicable here. In 421 F. 2d, at 1323, he said:

> "The orderly and fair administration of justice requires a firm enforcement of the Rules of Appellate Procedure and the speedy prosecution of appeals. *** Any dereliction the result of which is to place on the appellee the burden of moving to dismiss the appeal is evidence of a lack of good faith on the part of an appellant. Unless *** application for extended time is made so that it may be considered before the allotted time has expired, it is evidence of a lack of good faith and, failing extraordinary circumstances, it constitutes neglect which will not be excused."

In the Gilroy case, the appellant was guilty of failing to provide for the transmission of the record on appeal, to pay the docket fee, and failure to file an appendix and brief. The appellee moved to dismiss the appeal. The appeal was not dismissed, but the Court directed the attorney for the appellant to perfect the appeal within 30 days by filing his brief and appendix, under penalty of dismissal. The costs of the motion to dismiss were assessed against the appellant's attorney.

In United States v. Lefkowitz, 284 F. 2d 310 (2d Cir. 1960), this Court had before it another case where the appellants had either filed no appendix, or an insufficient appendix, to enable the Court to pass upon the merits of the appeal. Rule 15 (b) of the rules

of this Court provided for an appendix, and its provisions have now been incorporated in F.R.A.P. Rule 30. The provisions of Rule 15 (b) were almost identical with the provisions of Rule 30 (a).

Speaking directly to this point, Judge Friendly, in 284 F. 2d, at 316, said:

> "Rule 15 (b), adopted in an effort to save parties the expense of printing immaterial parts of long records, demands a good faith effort by counsel to reproduce those parts that are material; ***. The current failure of many counsel to make such an effort imposes on us a burden of searching through transcripts and of sending for copies of exhibits not in the clerk's file which we ought not and particularly because of our necessary reliance on distinguished visitors from other circuits, cannot practically assume. It is not our intention to permit Rule 15 (b) to be ignored as it now too often is, and we shall feel free to adopt appropriate sanctions for its violation, such as requiring the filing of proper appendices either before or after argument, disregarding portions of the transcript not reproduced, and, in cases of flagrant breach by appellants, dismissal of the appeal."

In the instant case, there is no live testimony, and the transcript contains only 34 pages. However, the Jowdys' failure to prepare and file a single appendix, in which they reproduce the exhibits which provide the

documentary evidence upon which the judgment is based, imposes upon this Court the burden of searching through the documentary exhibits to find error. This Court is under no duty to search the record for error.

Walters v. Shari Music Publishing Corporation, 298 F. 2d 206 (2d Cir. 1962), was an appeal from the District Court's action in dismissing plaintiff's appeal, and in awarding summary judgment to the defendants.

In that case, the appellant filed a 6-page so-called appendix which contained copies of two opinions. However, there was no appendix filed by the appellant which contained the contents specified by Rule 15 (b) which was in effect on the date of the decision.

Judge Medina, speaking for this Court, again pointed out the dim view taken by this Court for violation of the appellate rules respecting the preparation and filing of an adequate appendix. After specifically pointing out the required documents, which were missing from the appendix, and in 298 F. 2d, at pp. 207, 208, he said:

> "***. Furthermore, such portions of appellant's affidavits read in support of appellant's motion for summary judgment and in opposition to appellees' motion for summary judgment, as are relied on in appellant's brief are not printed. True there are in appellant's brief a few excerpts from some of the papers above enumerated, but this only makes the matter worse, as the Court will be required to look at the file containing voluminous papers in order to put the excerpts in context and understand them, unless appellees take over appellant's burden of complying with Rule 15 (b).
>
> "The net result is that we do not have a token compliance with Rule 15 (b). No real effort has been made to set forth the material necessary to make it possible for the Court to understand the arguments for reversal contained in appellant's brief."

The court was considering a motion by appellees to dismiss the appeal for failure of appellant to file the appendix. The court granted the motion to dismiss, unless the appellant filed the required appendix within three weeks, and the court enumerated the papers which the appendix must contain. The court awarded costs to the appellee to be paid by the attorneys for the appellant.

As we have seen in the two cases decided in this Court, there was some pretense of an appendix. Here, however, there is no pretense of an appendix.

The Jowdys and their attorney have completely ignored the simple requirement of Rule 30 (a) that the appellant shall prepare and file an appendix to the briefs which shall contain the papers specifically enumerated therein.

Failure of the Jowdys to comply with F.R.A.P. Rule 30 (a), which requires the filing of a single appendix may, and should, result in drastic action by this Court. Braniff Airways, Inc. v. Curtiss-Wright Corp., 411 F. 2d 451 (2d Cir. 1969), cert. den. 400 U.S. 829, 91 S. Ct. 59, 27 L. Ed. 2d 59.

In other circuits, where the appellant has failed to comply with the rules requiring him to file an appropriate appendix, the courts have refused to search the record for error, and have affirmed the judgment of the court below.

Thus, Sparrow v. Yellow Cab Co., 273 F. 2d 1 (7th Cir. 1960), was an action for personal injuries. The case was tried before the court and a jury. On motion by the defendant, the District Court entered judgment, notwithstanding the verdict. Appellant appealed from the court's action, claiming that the

evidence was not sufficient to support the judgment n.o.v. However, he did not file a sufficient appendix in compliance with Seventh Circuit Rule 16 which required the appellant to prepare and file an appendix, similar to Rule 15 (b) of this Court.

Speaking directly to this point, in 273 F. 2d, at p. 4, the court said:

> "We are not required to resort to the record to find a basis for reversal. Yet, in order to appraise the testimony within the scope of our appellate review, that is what we would be required to do here. Plaintiff, an admitted perjurer, now seeks a new trial at our hands, in order that he may have a second chance to tell the truth. Under such circumstances, we feel no compulsion to search the record for him in order to give him his relief. On the evidence as revealed in the appendix to his brief, we cannot say that the trial court erred in granting defendant's motion for judgment n.o.v. on the merits of the case."

A. O. Smith Corporation v. Pre Fab Transit Co., 287 F. 2d 210 (7th Cir. 1961), was an appeal by the defendant from a summary judgment entered for the plaintiff. Defendant alleged in its brief that there was a material question of fact and that plaintiff was not entitled to a judgment as a matter of law.

The Court of Appeals affirmed the judgment of the district court, and in doing so, it uses this very cogent language:

> "Defendant is in no position to urge these points upon us, because it has failed to comply with the rules of this court requiring relevant parts of the record to be reproduced in an appendix. ***. For that reason, the judgment of the district court is affirmed."

Teitelbaum v. Curtis Publishing Company, 314 F. 2d 94 (7th Cir. 1963), was an action for libel against a magazine publisher. The case was tried before a jury which found defendant not guilty, and judgment was entered on the verdict for defendant. Plaintiff appealed, but failed to set forth in his appendix sufficient parts of the record upon which the errors were assigned.

The court affirmed the judgment, following Sparrow v. Yellow Cab Co., supra, stating that, in the absence of an adequate appendix setting forth the proceedings and evidence in the district court, it would refuse to search the record in order to find whether plaintiff is entitled to a reversal of the judgment of the

district court. For that reason, the judgment was affirmed.

In United States v. Dixon, 343 F. 2d 510 (7th Cir. 1965), the defendant was convicted of a narcotics charge, and he appealed the conviction to the Court of Appeals, but he filed no appendix as required by the appellate rules then in force. The court affirmed the judgment of the lower court in these words: "The defendant *** filed a brief but no appendix of any kind. For these reasons the judgment from which this appeal was taken is affirmed."

In Kelley v. Dunne, 369 F. 2d 627, 628 (1st Cir. 1966), the appellant filed no appendix, and the Court of Appeals affirmed the judgment of the court below, saying that "the court of appeals cannot and will not pass upon the correctness of the findings of the court below when no appendix has been filed, and only a very small portion of the transcript has been made available."

Here, the Jowdys have filed no appendix of any kind. Yet, they claim in their brief, very vaguely,

that there is a clear factual issue in plaintiff's affidavits and pleadings, but they have presented no adequate appendix which sets forth the proceedings and the evidence in the district court of which they complain. Under those circumstances, all of the cases cited and discussed above hold that the court will not search the record for error, and that the judgment appealed from will be affirmed.

As the court said in A. O. Smith Corporation v. Pre Fab Transit Co., supra, the Jowdys are "in no position to urge these points upon" this Court "because (they) have failed to comply with the rules *** requiring the relevant parts of the record to be reproduced in an appendix."

For that reason, this Court should follow the First and Seventh Circuits, and summarily dispose of this appeal by affirming the judgment of the District Court, and thus put an effective end to this frivolous appeal.

Point II.

For the Jowdys' failure to comply with the mandatory requirements of F.R.A.P. Rule 30 (a) that the appellant shall prepare and file an appendix with his brief, the Court is justified in dismissing their appeal.

Only a few cases have been found where an appellant has completely disregarded the appellate rule which requires the preparation and filing of an appendix to the briefs.

In Point I, we have cited and discussed those cases, in which the appellant filed no appendix at all, or where there was an insufficient appendix, and, in those cases, the courts affirmed the judgment without any consideration of the case on its merits. In two cases where the appellant filed no appendix at all, there was a summary affirmance of the judgment from which the appeal was taken. See A. O. Smith Corporation v. Pre Fab Transit Co., 287 F. 2d 210 (7th Cir. 1961); and United States v. Dixon, 343 F. 2d 10 (7th Cir. 1965).

Here, we shall consider those cases which have dismissed the appeals, where the appellants have disregarded the appellate rules requiring the preparation and filing of an appendix to the briefs.

Here, the Jowdys have made no pretense at compliance with F.R.A.P. Rule 30 (a) which mandates that the appellant shall prepare and file an appendix with his brief, under the circumstances which prevailed here.

They have filed a short brief which does not even comply with F.R.A.P. Rule 28 (a) and (e), which requires the appellant's brief to contain a statement of the case, a statement of facts, and references to the parts of the record reproduced in the appendix, upon which the appellant relies. They attack the judgment of the District Court in three points, but any consideration of those points would require this Court to search the record for the errors of which they complain. An appellate court is not required to search the record for errors. Holt v. Sarver, 442 F. 2d 304, 307 (8th Cir. 1971).

In United States v. Lefkowitz, 284 F. 2d 310, 316 (2d Cir. 1960), this Court was considering a case where no appendix was filed by the appellant, or the purported appendix was wholly insufficient, as required by former Rule 15 (b) of this Court, which was almost identical with the provisions of F.R.A.P. Rule 30 (a).

In that case, this Court said that the failure of an appellant to prepare and file an adequate appendix imposed on it a burden of searching through transcripts and sending for copies of exhibits not in the clerk's file which it ought not, and practically could not do. This Court said that it would feel free to adopt appropriate sanctions for the violation of the rule requiring the preparation and filing of an appendix, and in case of flagrant violation of the rule, the appeal would be dismissed.

In Walters v. Shari Music Publishing Corporation, 298 F. 2d 206 (2d Cir. 1962), Judge Medina was considering a case where the appellant had made some pretense at filing an appendix as required by former Rule 15 (b), but it did not contain the parts of

the record which were specified in Rule 15 (b). In that case, the appellee moved to dismiss the appeal for the appellant's failure to comply with the rule, and Judge Medina granted the appellee's motion to dismiss the appeal, unless the appellant filed a new appendix which contained all of the parts of the record which were specifically enumerated by Judge Medina, within three weeks. He also assessed costs in favor of the appellee and against the appellant's attorney.

Here, the Jowdys have filed nothing in the way of an appendix, and they are in flagrant violation of Rule 30 (a).

In Harrelson v. Lewis, 418 F. 2d 246 (4th Cir. 1969, the court dismissed the appeal for failure of the appellant to comply with the appellate rule requiring the preparation and filing of an appendix.

In Weinberger v. Group, 339 F. 2d 34 (1st Cir. 1964), where the appellant had been granted an extension of time within which to file the appendix to the brief, and he did not do so within the extended time, but thereafter applied for a further extension of time,

the court denied the extension, and dismissed the appeal.

In dismissing the appeal, the court said that a cause which has resulted from a party's own lack of diligence was not good cause for which an extension would be granted for filing the appendix.

Here, the Jowdys never applied for an extension of time within which to file the appendix, and no extension has been granted. They filed no application for an order directing them to file a deferred appendix. The time for any such extension has long since expired.

F.M.C. Corporation v. Knowles Electric, Inc., 438 F. 2d 1220 (4th Cir. 1971), was an action to recover damages as a result of a fire which occurred allegedly as a result of defendant's negligence. From a general jury verdict for defendant, plaintiff appealed. However, the appellant filed no appendix. In dismissing the appeal, the court had this to say:

> "Our review of the case has been made more difficult by F.M.C.'s failure to file an appendix in compliance with Rule 30, F.R.App. Pro. Permission to dispense with an appendix was neither sought nor granted in accordance with

> Rule 30 (f), supra. We therefore conclude that the appeal should be dismissed."

Under all of the cases, for a flagrant violation of the appellate rule requiring the preparation and filing of an appendix by appellant, the appeal will be dismissed.

Since the Jowdys have filed no appendix of any kind with their brief, and since they have willfully delayed the filing of the appendix beyond the period when they could have asked for an extension of time, fairness and justice demand that they not be given any extension within which to file the appendix, even if they should ask permission to do so.

The Court Properly Considered The Supplemental Affidavit and Exhibits at the Hearing.

In Point I of their brief (p. 3), the Jowdys urge the point that it was too late for INA to present the supplemental affidavit in support of the motion for summary judgment and the proposed findings of fact and conclusions of law.

As we have already demonstrated in Point I, and in this Point II, the Jowdys are in no position to urge this point upon this Court for the reason that they

have not filed an appendix which contains the affidavit and exhibits of which they complain.

However, the point is entirely without merit even if an appendix had been filed which contained the affidavit and exhibits annexed thereto. Fed. Rules Civ. Proc. rule 56 (e) specifically provides that: "The court may permit affidavits to be supplemented *** by *** further affidavits." Moreover, in Wood v. Allied Concord Financial Corp., 373 F. 2d 733 (5th Cir. 1967), the court held that, allowing an affidavit of a representative of plaintiff financial corporation, purporting to show that the corporation relied on defendant's holding herself out as a partner as a consideration of the transaction involving a sale to the corporation of a series of mortgage notes, to be filed on the day of the hearing of a motion for summary judgment was not an abuse of discretion.

The Jowdys cannot be heard to complain on this appeal that the affidavits and exhibits filed on the day of the hearing were untimely, when their attorney was in court, read the affidavit, saw the exhibits, and

raised no objection to it being filed. Schy v. Susquehanna Corp., 419 F. 2d 1112 (7th Cir. 1970), cert. den. 400 U.S. 826, 91 S. Ct. 51, 27 L. Ed. 2d 55.

The Jowdys Have Had Their Day In Court.

In Point II of their brief (p. 5), they somewhat incoherently argue that the Jowdys had the right to have the case tried to a jury, and since it was not so tried, they have been denied due process of law.

As we have seen in Point I, and so far in this Point II, the Jowdys' failure to file an appendix in compliance with the mandatory requirement of F.R.A.P. Rule 30 (a) precludes them from raising that question in this appeal, and it is too late for them to urge the point on this Court.

Even if the Jowdys had filed an appropriate appendix which contained the affidavits, the exhibits, and the findings of fact and conclusions of law, the point argued in pages 5 to 7 of their brief is completely lacking in merit. In the first place, the Jowdys filed no answer, or other pleading, to assert a defense, and demand a jury trial. In the second place, they

filed no affidavit in opposition to the motion for summary judgment. Finally, their attorney was in court when the supplemental affidavit was filed with the Court and accepted by the Court, and he made no objection to the affidavit being filed or to its acceptance.

In addition to the foregoing, the cases cited by the Jowdys in support of their argument under Point II simply do not support their argument.

INA has specifically referred to the first two points in the Jowdys' brief, and discussed them under this point to further demonstrate to this Court that the appeal is completely devoid of merit, and is extremely frivolous.

INA's motion for summary affirmance of the judgment appealed from, or its motion to dismiss the appeal should be granted, and INA should be awarded appropriate costs.

Argument

Point III.

The District Court made detailed findings of fact and conclusions of law, based upon a consideration of the complaint, the exhibits attached thereto, the affidavits supporting INA's motion for summary judgment and the exhibits annexed thereto, and this Court cannot set aside those findings of fact unless they are clearly erroneous. Fed. Rules Civ. Proc. rule 52 (a).

Fed. Rules of Civ. Proc. rule 52 (a) provides that:

> "In all actions tried upon the facts without a jury ***, the court shall find the facts specially and state separately its conclusions of law thereon, and a judgment shall be entered pursuant to Rule 58; ***. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. ***."

Rule 52 (a) states in positive terms that findings of fact shall not be set aside by an appellate court, unless clearly erroneous.

The cases to be cited and discussed below, as applied to the record in this case, will show clearly what is meant by the "clearly erroneous" standard.

Purpose of Requiring Court To Find Facts Specially.

Rule 52 (a), by requiring the court to find the facts specially, and to state separately its conclusions of law thereon, makes definite what was decided by the case; it serves to evoke care on the part of the trial judge in ascertaining the facts; and it aids the appellate court by affording it a clear understanding of the ground or basis of the trial court's decision. Lemelson v. Kellogg Company, 440 F. 2d 986 (2d Cir. 1971), and cases cited therein.

The District Court's detailed findings of fact and conclusions of law which were filed in this case (R. Doc. 7, pp. 1-21) clearly show care on the part of the Court in ascertaining the facts of the case in context as disclosed by the entire record. They clearly afford this Court a clear understanding of the ground or basis of its decision.

The Findings of Fact Are Not Clearly Erroneous.

Since the Jowdys have failed to comply with the mandatory requirements of F.R.A.P. Rule 30 (a) that the "appellant shall prepare and file an appendix ***

with his brief," which shall contain the parts of the record specifically enumerated therein, this Court is not required to search the record for error, as we have clearly demonstrated in Points I and II.

For the Jowdys' failure to comply with the mandatory requirement of F.R.A.P. Rule 30 (a), this Court is justified in granting INA's motion for a summary affirmance of the judgment or, in the alternative, its motion to dismiss the appeal. In fairness and justice to this Court and to INA, this Court should refuse to consider the appeal on its merits, for indeed it has no merits.

However, if the Jowdys had filed a proper appendix, as required by Rule 30 (a), the appendix would reveal that there is adequate evidenciary support in the record for the findings, and that the evidence was properly appraised by the District Court.

In any consideration of the findings of fact and conclusions of law, it must be kept in mind that the Jowdys filed no answer, or other pleading, to the complaint. They asserted no defense to INA's claims

set forth in the complaint. They filed no affidavit in opposition to INA's motion for summary judgment, much less an affidavit which set forth facts which showed that there was a genuine issue as to a material fact.

Under those circumstances, they admitted all of the facts alleged in the complaint, and asserted in the supporting affidavits. They had waived any possible defenses they might have to the claims by failing to assert them in an affirmative defense.

The findings of fact in this case are measured on appellate review by the "clearly erroneous" standard prescribed by Fed. Rules Civ. Proc., rule 52 (a). "In reviewing a judgment of the trial court sitting without a jury ***, the Court of Appeals may not set aside the judgment below, unless it is clearly erroneous. United States v. United States Gypsum Co., 333 U.S. 364, 394-395, 68 S. Ct. 525, 542, 92 L. Ed. 746, 765-766 (1948); McAllister v. United States, 348 U.S. 19, 75 S. Ct. 6, 9, 99 L. Ed. 20 (1954); Zenith Corporation v. Hazeltine, 395 U.S. 100, 123, 95 S. Ct. 1562, 1576,

23 L. Ed. 2d 129 (1969).

In Zenith, the Supreme Court of the United States stated the applicable rule as follows:

> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the facts, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence (it) is left with the definite and firm conviction that a mistake has been committed.' United States v. United States Gypsum Co., 333 U.S. 364, 365, 68 S. Ct. 525, 542, 92 L. Ed. 746 (1948) ***."

The same rule has been adopted by this Court in Lassiter v. Fleming, 473 F. 2d 1374 (2d Cir. 1973) and United States v. Pfingst, 490 F. 2d 262 (2d Cir. 1973).

If the District Court's findings, considering the record as a whole, whether based on live or other types of evidence are reasonably supported, they must stand, for the reviewing court's function does not differ because the evidence is all documentary and by depositions and

affidavits. Custom Paper Products Co. v. Atlantic Paper Box Co., 469 F. 2d 178 (1st Cir. 1972).

In this case, the Jowdys, as the complaining parties, have the burden to clearly demonstrate error in the factual findings of the District Court. Lindsay v. McDonnell Douglas Aircraft Corporation, 485 F. 2d 1288 (8th Cir. 1973).

In Point III of the Jowdys' brief (p. 7), they claim that a clear factual issue appears in INA's affidavits and pleadings, which would prevent entry of summary judgment. A short answer to that claim is that the District Court found specifically that there was no issue of fact, much less an issue as to a material fact (Find., Doc. 7, p. 21). To set aside that finding, as well as the other findings, the Jowdys have the burden of demonstrating that it is erroneous.

Again, it is well to note that the Jowdys have not filed an appendix as required by F.R.A.P. Rule 30 (a), in which they set forth the pleadings and affidavits which they claim show the existence of the issue of fact. Therefore, they are in no position to urge that point on this Court.

The Jowdys asserted a defense in a memorandum brief which their attorney filed in opposition to INA's motion for summary judgment, that their indemnity agreements which were dated July 1, 1970, did not cover INA's loss on Gelb's Connecticut tax credit bond, which was dated, signed, and sealed by the principal and surety on June 26, 1970. Apparently that is the point being made in Point III of the Jowdys' brief (pp. 7, 8).

The Jowdys and their attorney knew from the beginning that the indemnity agreements contained the words "hereafter written". Moreover, they knew from the beginning that the indemnity agreements were dated July 1, 1970, and that the bond was dated June 26, 1970. If they claimed that as a defense, then the time to have asserted the defense was in an answer to the complaint, by way of an affirmative defense.

The District Court specifically held that, by failing to assert the affirmative defense in a responsive pleading, the Jowdys have waived the defense, citing Fed. Rules Civ. Proc. rules 8 (c) and 12 (h), and a great

number of cases. (Conclusions of Law, Doc. 7, pp. 18-20).

Moreover, the District Court specifically found that under the totality of the circumstances surrounding the execution of the Connecticut tax bond, dated, signed, and sealed on June 26, 1970, it was mutually intended by all parties to become effective July 1, 1970. It was intended by the parties that the indemnity agreements signed by the Jowdys on July 1, 1970 would apply to that specific bond, and it constituted one continuing contractual agreement (Doc. 7, par. 28 (a), p. 9a).

The other disjointed claims in the Jowdys' brief do not warrant a reply.

Point IV.

When the complaint, affidavits, and documentary exhibits on file showed that there was no genuine issue as to any material fact, and that INA was entitled to judgment as a matter of law, the District Court correctly entered summary judgment for INA. Fed. Rules Civ. Proc. rule 56 (a), (c), (e), 28 U.S.C.A.

Here, the Jowdys have filed no answer, or other pleading, as required by the rules. Fed. Rules Civ. Proc. rule 12 requires a defendant to file his answer or other pleading to the complaint within 20 days after the date of service of the summons and a copy of the complaint upon him.

In the absence of an answer, all well pleaded allegations in the complaint are deemed to be admitted. Rule 12 (h) provides that all defenses not made in a responsive pleading, or by motion, are waived.

INA's motion for summary judgment was supported by affidavits and documentary exhibits attached thereto, as well as the four indemnity agreements which were attached as exhibits to the complaint.

The Jowdys filed no affidavit in opposition to INA's motion for summary judgment, and therefore, there was no issue of fact in the case, much less a genuine issue as to a material fact.

The discussion in the Jowdys' brief under Point III (pp. 7-9) is wholly irrelevant, for a lawyer cannot testify in a brief, and there were no denials

in an answer filed by the Jowdys.

It is very clear that the Jowdys never had any intention of filing an appendix to the briefs as required by F.R.A.P. rule 30 (a) for the very good reason that they knew the appendix would not support their claims, and would on the contrary show conclusively that the appeal is devoid of merit, and is completely frivolous.

CONCLUSION

On the undisputed facts of this case as recited and documented herein, and in light of the Jowdys' intentional and willful failure to file an appendix of any kind in flagrant violation of F.R.A.P. Rule 30 (a) which requires an appellant to file an appendix with his brief, and in light of the controlling principles of law set forth in the cases cited and discussed herein, this Court should grant INA's motion for summary affirmance of the judgment from which the appeal is taken, or in the alternative grant INA's motion to dismiss the appeal with finality, and this Court should use its discretion to award INA a reasonable attorney's fees as costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I hereby certify that, on September 20, 1974, I served two copies of the foregoing brief for plaintiff-appellee on Norris L. O'Neil, Esquire, 99 Pratt Street, Hartford, Connecticut 06103 by United States mail, postage prepaid.

Elmer W. Beasley